In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-174

MAL BROS. CONTRACTING CO. and GEORGE MALANGA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. The background of this case is set forth in the opinion below (Pet. App. A, at 2a-7a) and need not be repeated here. Petitioners were held in civil contempt for failing to produce records of Mal Bros. Contracting Company before a federal grand jury following a subpoena and court order. The court of appeals affirmed. The sole issue of substance[1] is whether the courts below properly rejected petitioner

[1] There is patently no merit to petitioners' ancillary contention that the grand jury subpoenas were the equivalent of a general search warrant (see Pet. 20-22).

George Malanga's Fifth Amendment claim of privilege against self-incrimination with respect to the records of a partnership of which he was one of three general partners.

The district court conducted an evidentiary hearing on the claim and held that the Fifth Amendment privilege was not available to petitioner Malanga. It applied the test of *United States* v. *White*, 322 U.S. 694, 701:

> [W]hether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity. Labor unions—national or local, incorporated or unincorporated—clearly meet that test. * * *

The court concluded that under its findings as to the nature of Mal Bros. Contracting Company, set forth at 477a-488a,[2] the records here sought were of an "impersonal nature" held in a representative capacity by petitioner Malanga, and not his "private records" (487a). The court of appeals affirmed this determination.[3]

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[2] The reference is to petitioners' appendix in the court of appeals, a copy of which we are loding with the Clerk of this Court.

[3] The court of appeals held alternatively that the test announced in *White, supra,* was dictum and not controlling

2. There is no reason for further review. The applicable standard for resolving questions of the sort involved here has been established in *White*. Thus, the controversy here presents only the narrow question whether the courts below correctly applied the *White* test. See, *e.g.*, *United States* v. *Silverstein*, 314 F.2d 789 (C.A. 2), certiorari denied, 374 U.S. 807. Petitioners argue that they did not because they looked to the financial size of the partnership rather than to its structure, and applied an impermissible balance sheet standard. See Pet. 9, 14-20; *United States* v. *Cogan*, 257 F. Supp. 170, 173-174 (S.D. N.Y.).

Although the courts below did note various facts indicating the financial size of the partnership entity, it is clear from the district court's findings that the result below turned on the structure of the partnership and not just its worth.[4] In addition to point-

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in light of subsequent cases where this Court had "routinely denied the 5th Amendment privilege to unincorporated associations without discussion of size, impersonality or other circumstances. *McPhaul* v. *United States*, 364 U.S. 372; *United States* v. *Fleischman*, 339 U.S. 349" (Pet. App. 9a). Insofar as the court below may have intended to imply that the Fifth Amendment privilege may never be successfully asserted by a partner as to partnership records, we need not agree. As the petition points out (Pet. 11), the *McPhaul* and *Fleischman* cases involved political organizations—the Civil Rights Congress and the Joint Anti-Fascist Refugee Committee—which clearly satisfied the test of *White*. Under that test, which we deem applicable here, some but not all partnerships may be such as to render appropriate a claim by a partner of the privilege against self-incrimination as to the partnership records.

[4] There is nothing improper, in our view, in the courts below observing that the partnership entity was large in a

ing out that Mal Bros. Contracting Company employs 150-200 persons with a payroll of about $1 million annually, has a separate engineering department, and annual receipts of approximately $10 million (excluding joint ventures with other companies), the district court specifically found that neither petitioner Malanga nor any of the general partners had engaged in the preparation of the books or records of the company or knew of their contents, and that "Mrs. Freedman [the general manager] runs the show, so to speak, from a bookkeeping angle" (486a). This combination of facts as to the nature of the partnership was sufficient to support the conclusions reached below that the records of Mal Bros. Contracting Company were in no sense imbued with a private or personal character as to petitioner Malanga. *United States* v. *Silverstein, supra;* compare *United States* v. *Cogan, supra.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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financial sense. Clearly, financial size will often be linked with structural complexity and impersonality, the factors relevant under the *White* standard.

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